



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

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To: Office of Governmental Affairs, State Bar of California

From: John A. Hartog, Chair, Trust and Estates Section Executive Committee
James B. MacDonald, Member Trusts and Estates Section Executive Committee

Re: Project No. 2003-02; Creation of New Sections 18105 through 18108 and Amendments to Section 18100.5 Under Chapter 2 of Part 6 of Division 9 of the California Probate Code

Section: Trusts and Estates Executive Committee

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Digest: Existing law authorizes recordation of an Affidavit of Death of Trustee in those cases where there has been a change of a Trustee caused by the death of a former Trustee. Existing law does not provide for such a recordation in those cases where there has been a change of a Trustee caused by factors other than death, such as resignation, incapacity, or removal, etc.

Existing law permits recordation of a Trust which relates to real property, but does not permit recordation of a Certification of Trust which relates to real property and which complies with the requirements of Section 18100.5 of the California Probate Code.

Purpose: The proposed statutory additions and amendments to Chapter 2 of Part 6 of Division 9 of the California Probate Code will (1) authorize recordation of an Affidavit of Change of Trustee (Sections 18105 through 18108) and (2) modify existing Section 18100.5 to allow recordation of a Certification of Trust.

Sections 18105 through 18107 are patterned after the language set forth in Sections 210 through 212 of the California Probate Code which authorize recordation of an Affidavit of Death of Trustee, provide indexing rules and procedures for the grantor/grantee indexes and establish a presumption of proof for persons put on notice thereby.

The proposed language expands upon the language in its counterparts by including “interests in real property” (e.g., Leases, Deeds of Trust, etc.), as well as “titles” to real property.

Since no “official certificate” is generally available under the contemplated circumstances to evidence the event triggering the succession of the new Trustee (as distinguished from a death certificate in the case of death), Section 18108 is added which adds requirements similar to those set forth in Section 18100.5(e) which require anyone offering a Certification of Trust to provide copies of those excerpts from the original Trust documents and amendments thereto which designate the Trustee and confer upon the Trustee the power to act in the pending matter.

New Section 18108 requires the successor Trustee to provide copies of the same excerpts *and* excerpts from any other documents which evidence or pertain to the succession of the successor Trustee(s) to anyone requesting them whose interest is or may be affected by the recordation of the Affidavit of Change of Trustee.

The proposed amendments to Section 18100.5 authorize recordation of a Certification of Trust which complies with its requirements. Such recordation would serve the useful purposes contemplated by Section 15210 of the California Probate Code which permits recordation of a Trust itself when it relates to real property, without compromising the privacy of the instrument to the same degree. Further, it is some lawyers’ practice to attach Certifications of Trust to Deeds as exhibits, thereby putting them of record, even though there is no current authorization for them to be recorded as stand alone documents. The proposed modifications to Section 18100.5 of the Probate Code will authorize such recordation and address related issues.

- Application:** The proposed additions and amendments would be available to all Trustees in all Trust administrations.
- Documentation:** The sponsor is not aware of any formal studies or documentation.
- History:** No history of a similar legislative proposal is known to exist.
- Pending litigation:** This proposal will not affect any known current legislation.

- Likely Support or Opposition:** The Committee believes that the proposed legislation will more than likely find substantial support by professional and corporate Trustees, as well as counsel for individual (non-professional) Trustees.
- Fiscal Impact:** The legislation should have little fiscal impact and may save costs and expenses by simplifying the process of documenting of record a succession of a Trustee in cases other than those arising from death of a Trustee.
- Germaneness:** Administrations of trust estates will be made easier and changes in the succession of record title to properties and interests in property held in Trusts will be able to be put of record consistent with the race/notice policies and purposes of the California recording statutes.
- Text:** The following Sections are added as 18105 through 18108 to, and the following amendments are made in Section 18100.5 of Chapter 2 of Part 6 of Division 9 of the California Probate Code.

§ 18105. If title to an interest in real property is affected by a change of trustee, the successor trustee(s) may execute and record in the county in which the property is located an affidavit of change of trustee. The affidavit shall include the legal description of the real property, the name(s) of the former trustee(s) and the name(s) of the successor trustee(s). The affidavit may also, but is not required to, include excerpts from the original trust documents, any amendments thereto, and any other documents evidencing or pertaining to the succession of the successor trustee(s).

§ 18106. (a) A document establishing the fact of change of trustee recorded pursuant to this chapter is subject to all statutory requirements for recorded documents.

(b) The county recorder shall index a document establishing the fact of change of a trustee recorded pursuant to this section in the index of grantors and grantees. The index entry shall be for the grantor, and for the purpose of this index, the person who has been succeeded as trustee shall be deemed to be the grantor.

§ 18107. A document establishing the change of a trustee recorded pursuant to this chapter is prima facie evidence of the change of trustee insofar as the document identifies an interest in real property located in the county, title to which is affected by the change of trustee. The presumption established by this section is a presumption affecting the burden of producing evidence.

§ 18108. Any person whose interest is or may be affected by the recordation of an affidavit of change of trustee pursuant to this chapter may require that the

successor trustee provide copies of those excerpts from the original trust documents, any amendments thereto, and any other documents which evidence or pertain to the succession of the successor trustee(s). Nothing in this section is intended to require or imply an obligation to provide the dispositive provisions of the trust or the entire trust and any amendments thereto.

§ 18100.5. (a) The trustee may present a certification of trust to any person in lieu of providing a copy of the trust instrument to establish the existence or terms of the trust. A certification of trust may be executed by the trustee voluntarily or at the request of the person with whom the trustee is dealing.

(b) The certification of trust may confirm the following facts or contain the following information:

(1) The existence of the trust and date of execution of the trust instrument.

(2) The identity of the settlor or settlors and the currently acting trustee or trustees of the trust.

(3) The powers of the trustee.

(4) The revocability or irrevocability of the trust and the identity of any person holding any power to revoke the trust.

(5) When there are multiple trustees, the signature authority of the trustees, indicating whether all or less than all of the currently acting trustees are required to sign in order to exercise various powers of the trustee.

(6) The trust identification number, whether a social security number or an employer identification number.

(7) The manner in which title to trust assets should be taken.

(8) The legal description of any interest in real property held in the trust.

(c) The certification shall contain a statement that the trust has not been revoked, modified, or amended in any manner which would cause the representations contained in the certification of trust to be incorrect and shall contain a statement that it is being signed by all of the currently acting trustees of the trust. The certification shall be in the form of an acknowledged declaration signed by all currently acting trustees of the trust.

(d) The certification of trust may also, but is not required to, include excerpts from the original trust documents, any amendments thereto, and any other documents evidencing or pertaining to the succession of successor trustee(s). The certification of trust shall not be required to contain the dispositive provisions of the trust which set forth the distribution of the trust estate.

(e) A person whose interest is or may be affected by the certification of trust may require that the trustee offering or recording the certification of trust provide copies of those excerpts from the original trust documents, any amendments thereto, and any other documents which designate, evidence or pertain to the succession of the trustee and, or, confer upon the trustee the power to act in the pending transaction. Nothing in this section is intended to require or imply an obligation to provide the dispositive provisions of the trust or the entire trust and amendments thereto.

(f) A person who acts in reliance upon a certification of trust without actual knowledge that the representations contained therein are incorrect is not liable to any person for so acting. A person who does not have actual knowledge that the facts contained in the certification of trust are incorrect may assume without inquiry the existence of the facts contained in the certification of trust. Actual knowledge shall not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the trust certification. Any transaction, and any lien created thereby, entered into by the trustee and a person acting in reliance upon a certification of trust shall be enforceable against the trust assets. However, if the person has actual knowledge that the trustee is acting outside the scope of the trust, then the transaction is not enforceable against the trust assets. Nothing contained herein shall limit the rights of the beneficiaries of the trust against the trustee.

(g) A person's failure to demand a certification of trust does not affect the protection provided that person by Section 18100, and no inference as to whether that person has acted in good faith may be drawn from the failure to demand a certification of trust. Nothing in this section is intended to create an implication that a person is liable for acting in reliance upon a certification of trust under circumstances where the requirements of this section are not satisfied.

(h) Except when requested by a beneficiary or in the context of litigation concerning a trust and subject to the provisions of subdivision (e), any person making a demand for the trust documents in addition to a certification of trust to prove facts set forth in the certification of trust acceptable to the third party shall be liable for damages, including attorney's fees, incurred as a result of the refusal to accept the certification of trust in lieu of the requested documents if the court determines that the person acted in bad faith in requesting the trust documents.

(i) Any person may record a certification of trust that relates to an interest in real property in the office of the county recorder in any county in which all or a portion of the real property is located.